No. 2510

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SWAYNE & HOYT, INC.
(a corporation),
Plaintiff in Error,

vs.

GUSTAV BARSCH,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

IRA A. CAMPBELL,
Attorney for Plaintiff in Error.

Filed this.....day of February, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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I.

Statement of the Case.

This writ of error is brought to reverse a judgment of the District Court for the District of Oregon.

The action was brought by Gustav Barsch, the defendant in error, to recover for personal injuries which he claimed to have sustained by reason of the negligence of Swayne & Hoyt, Inc., while in the employ of the latter as a stevedore upon a dock in the City of Portland. The action was tried before a jury, which returned a verdict for Barsch in the sum of $1400.

The accident out of which Barsch's injuries arose occurred about 7:30 on the evening of March 31, 1913.

Barsch had been engaged throughout the day, together with other stevedores, in unloading the steamship "Camino", which then lay alongside a wharf, known as the American-Hawaiian Steamship Company's Wharf, or Albers Wharf No. 3, on the waterfront in the City of Portland. At the time of the accident Barsch was assisting in unloading a steel beam from the hold of the "Camino". The beam had been taken from the hold of the "Camino" by means of a hoist and winch operated on the deck of the vessel and had been lowered to the floor of the dock. Barsch was engaged in unfastening one of the two cables which had been attached to the ends of the beam, and, before he had completed his operations, the winch driver started his engine, with the result that one end of the beam was suddenly lifted and struck Barsch. In his complaint, Barsch charged the plaintiff in error with the negligence of the winch driver in starting his engine, and, furthermore, with negligence in failing to furnish a system of communications, by means of signals, between the winch driver and the stevedores working on the dock, and in failing to supply a hatch tender who might have given a proper signal and prevented the accident.

The principal question upon this writ of error is whether or not, upon the undisputed evidence submitted to the jury at the trial thereof, the plaintiff in error herein, Swayne & Hoyt, Inc., can be held responsible to defendant in error, conceding that the defendant in error was injured to the extent found by the jury and by the negligent act or omission of someone. The

principal question here presented is disclosed by the following statement which the trial court made to the jury in the opening portion of his instructions:

> "Now, before it becomes necessary for you to consider the question of negligence it will be important for you to determine whether or not Swain & Hoyt are liable for this accident, if anybody is liable for it. It is not claimed, nor is there any evidence tending to show that Swain & Hoyt owned the steamer 'Camino'. There is no evidence nor is it claimed that Swain & Hoyt were the charterers of the vessel. The only testimony in reference to that matter is that they are what is referred to and denominated as managing agents, that is that they were acting for the owners." (Trans. pp. 159-160.)

Swayne & Hoyt, Inc., did not own the "Camino". It was owned by the Western Steam Navigation Company. Swayne & Hoyt, Inc., were what was known as the "managing agent" for the owner. We shall therefore review the facts briefly relating to this phase of the case, showing the exact relation of Swayne & Hoyt, Inc., to the Western Steam Navigation Company as such managing agent, and the exact relation which Swayne & Hoyt, Inc., and the Western Steam Navigation Company bore to the defendant in error herein, Gustav Barsch, at the time of his injury.

Swayne & Hoyt, Inc., was a California corporation, with its principal place of business in San Francisco. The steamer "Camino" was one of a number of steamers owned and operated by the Western Steam Navigation Company, plying between the ports of San Francisco, Portland and Seattle, and known as the "Arrow Line".

Swayne & Hoyt., Inc., acted as the "managing agent" in behalf of the Western Steam Navigation Company for the said Arrow Line, and, in particular, for the steamer "Camino".

On March 31, 1913, and for some months prior thereto, one C. D. Kennedy was employed by Swayne & Hoyt., Inc., as such managing agent, to act as "local agent" in Portland, Oregon. Kennedy paid all bills contracted for the ships of the Arrow Line while they were in Portland, including the stevedoring bill, collected freight that became due to the ship in Portland, and then forwarded an account to Swayne & Hoyt, Inc., in San Francisco. These accounts were rendered, on the average, every ten days.

Kennedy testified upon direct examination that he was employed as local agent for Swayne & Hoyt, Inc., and that he was employed by Swayne & Hoyt, Inc. He later admitted, upon cross-examination, however, that he was engaged by Mr. Moran; that Mr. Moran, while an officer of Swayne & Hoyt, Inc., was also an officer of the Western Steam Navigation Company and was in charge of its shipping department (Trans. p. 21). He also admitted that his correspondence with Mr. Moran might have been written by Mr. Moran either in behalf of Swayne & Hoyt, Inc., or the Western Steam Navigation Company (Trans. p. 22). He finally acknowledged that he knew that Swayne & Hoyt, Inc., were merely general agents for the Arrow Line and that he merely represented them as such agents.

We quote the following pages from Mr. Kennedy's cross-examination as establishing conclusively that he

merely acted as agent for Swayne & Hoyt, Inc., in its capacity as managing agent for the Western Steam Navigation Company.

> "Q. Now, what relation, do you know, from your conversations you have had with the members of the Swayne & Hoyt Company at the time you were appointed agent that you spoke of—what relation did Swayne & Hoyt have in connection with these boats? What do they call themselves?
> A. General agents for the Arrow Line.
> Q. General agents for the Arrow Line?
> A. Yes, sir.
> Q. Now, in handling these matters, they were not the officers or owners—you knew that, did you not?
> A. I didn't know that. I don't presume they were the owners. Might have been part owners.
> Q. You considered them as managing agents?
> A. Yes, sir.
> Q. And as managing agents, you represented them locally in Portland?
> A. Yes, sir." (Trans. pp. 24, 25.)

Finally, Kennedy acknowledged that he was nothing more than a sub-agent for the Western Steam Navigation Company. Such admission was contained in the following portion of his cross-examination:

> "Q. (Mr. Guthrie.) And you understood that Swayne & Hoyt were general agents for the owners, handling cargoes?
> A. Yes, sir.
> Q. And you were really sub-agents, through the agents of the owners, acting through the managing agents. Isn't that true?
> A. I presume so, yes." (Trans. p. 27.)

The positive testimony of Messrs. Hoyt, Moran and Swayne to the effect that Swayne & Hoyt, Inc., never employed Kennedy as its own agent (Trans. pp. 148,

153, 154, 155) was, therefore confirmed by the testimony of Kennedy, himself. It was undisputed.

Kennedy was associated in Portland with the American-Hawaiian Steamship Company, which owned the dock at which the "Camino" was unloading at the time of the injury to Barsch. The American-Hawaiian Steamship Company employed a foreman by the name of Dosch upon this dock, and it was the custom of Kennedy, whenever stevedores were wanted for vessels lying alongside the dock, to make arrangements for their employment through this foreman, Dosch. Dosch had general supervision over the stevedores who were actually employed upon the dock, and, when a vessel would come alongside the dock for unloading, he would ascertain from an officer of the vessel how many stevedores would be needed upon the vessel and then he would determine for himself how many he would want upon the dock for the particular job. He would then telephone to the Longshoremen's Union and request the business agent of the union to send the required number to the dock. E. A. Schneider was at the time, and for some time prior thereto had been, the secretary or business agent of the Longshoremen's Union, and it was to him that Dosch usually applied for stevedores. The employment of Barsch upon the 31st day of March, 1913, took place in this manner. The "Camino" came alongside the American-Hawaiian Dock (also known as Albers Dock No. 3). Dosch ascertained the number of stevedores required by himself and required by the mate to accomplish the unloading, and telephoned to Schneider at the Longshoremen's Union. Schneider

assigned the required number of stevedores to the job, including Barsch. We shall consider later, in an appropriate place, the statements of these various men who had to do with the employment of Barsch as to whom they represented or as to whom they thought they represented, and as to whom they said they represented, at the times when they acted in bringing about Barsch's employment.

No one fact is more significant, however, in determining whether or not Barsch was at the time of his injury in the employ of Swayne & Hoyt, Inc., or in the employ of the Western Steam Navigation Company, than the pay-roll which was signed by him and the other stevedores. This pay-roll was also controlling evidence as to the fact that Kennedy represented the Western Steam Navigation Company and not Swayne & Hoyt, Inc., in so far as he can be said to have employed Barsch and the other stevedores.

The stevedores who were employed by Dosch upon the Albers Dock No. 3 when the "Camino", or any other Arrow Line steamer, unloaded there were paid by Kennedy. At the end of each day the time of the men was figured. Dosch and a man named Williams prepared the pay-roll showing the time earned by the various stevedores and it was then sent to Kennedy's office. The stevedores would then call at Kennedy's office, or authorize Schneider to call for them, and would receive their pay from Kennedy. Each stevedore as he received his pay was required to sign his name and receipt upon the pay-roll. The pay-roll read as follows:

> "Received from Captain....., for account of above steamer and her owners." (Trans. p. 26.)

This form of pay-roll was shown to have been in use for some time prior to the 31st day of March, 1913, and Barsch was shown to have receipted upon numerous such pay-rolls prior to that date (Trans. pp. 26, 97-101).

Upon the bow of the steamer "Camino" was painted the following legend: "Arrow Line, Swayne & Hoyt, Managers." It appeared that after his injury, Barsch went to San Francisco and called upon Swayne & Hoyt, Inc., and some investigation of the extent and cause of his injuries was made by Swayne & Hoyt, Inc. Barsch testified that he was sure that he was employed by Swayne & Hoyt, Inc., but practically admitted that his sole reasons for believing so lay in the two facts last mentioned.

The negligence which was alleged to have occasioned Barsch's injury consisted either in the carelessness of the winchman in starting his engine before he received the signal to do so, or in the negligence of the mate of the "Camino" in giving such a signal carelessly, or in the alleged negligence of the owners of the vessel in failing to establish a system of signals between the stevedores upon the dock and the man in charge of the winch, or in failing to supply a hatch tender who might have given a safe and proper signal. If it be assumed, therefore, that Swayne & Hoyt, Inc., either through Kennedy, or in any manner whatsoever, became Barsch's employer, it is nevertheless clear upon the face of the record that Swayne & Hoyt, Inc., is not liable for the negligence charged in the complaint.

Assuming that Dosch, through Kennedy, became the agent of Swayne & Hoyt, Inc., Dosch's authority is not claimed to have extended to the men upon the deck of the "Camino". Neither is it claimed that Kennedy had any control over the men upon the "Camino" or over the methods of unloading which were employed upon the vessel itself. Kennedy testified that under the authority which he obtained from Swayne & Hoyt, Inc., he had no power to give directions of any sort to the mate or any officer of the "Camino"; that he could not, if he had so desired, have ordered the placing of a hatch tender upon the vessel or the installation of a system of signals between the winchman and the stevedores upon the dock. The mate and the winchman were employed and paid by the vessel. The winch and hoisting apparatus were owned by the owner of the vessel and controlled by its own employees. Dosch admitted that he had no control over the winch or what took place upon the vessel.

Under these facts, the ordinary case is presented of a vessel unloading at a dock, employing stevedores to assist in the unloading upon the dock, through an independent agency, and furnishing its own hoisting apparatus and its own employees to handle the same. We shall refer to authorities in the course of our argument which establish conclusively that in such a case the two employments are distinct and separate and that if a stevedore upon the dock is injured by the negligence of a winchman, or negligence of any employee of the vessel, the owner of the vessel is liable and the employer of the stevedore is not liable. Viewed in this light, it

might well be assumed, for purposes of argument, that Swayne & Hoyt, Inc., was the employer of Barsch, and, nevertheless, it would not be liable for injuries occasioned to Barsch by the negligent acts charged in the complaint.

A second question arises upon the record. The plaintiff in error requested the court to charge the jury that the Employers' Liability Act of Oregon of 1911 did not control the case, for the reason that Barsch's employment was a maritime contract, and for the reason that the "Camino" was engaged in interstate commerce and could not be subjected to the safety regulations prescribed in the act without involving a violation of the interstate commerce clause of the federal constitution. The trial court refused to do this and instructed the jury upon the theory that the Employers' Liability Act did control the case.

II.

Specification of Errors.

The points to which we have referred in our opening statement are covered by two of the assignments of error, Assignment I and Assignment IV. Assignment I reads as follows:

> "By the uncontradicted evidence in the cause Swayne & Hoyt, Inc., was the managing agent only of the steamship 'Camino', and the court erred in refusing to give the instructions to the jury requested by the defendant to return a verdict for the defendant."

Assignment IV is as follows:

> "The court erred in applying as the law of the case the Employers' Liability Law of Oregon, and in charging to the jury in the course of the charge to the jury that the state's statutes of the State of Oregon required that all machinery other than that operated by hand power should, whenever necessary for the safety of persons employed in or about the same, or for the safety of the general public, be provided with a system of communication by means of signals so that at all times there may be prompt and efficient communication between employees or other persons and the operator of the motive power, and that a failure to so provide would be negligence within the state's statutes of the State of Oregon, and would entitle the plaintiff to recover, and that if through negligence in giving a signal at the time when the signal should not have been given, and on this account the injury occurred, then that the defendant, if it was operating the vessel on its own account and not as a managing agent, would be responsible under the Oregon statutes, because the Oregon statutes made the foreman or person giving such signal a representative of the master."

III.

Brief of the Argument.

The argument for plaintiff in error will be devoted to establishing two points:

A. That the trial court erred in refusing to direct a verdict for the defendant.

B. That the trial court erred in applying the Employers' Liability Act of Oregon of 1911.

A.

The Trial Court Erred in Refusing to Direct a Verdict for the Defendant.

Our argument upon this point will take the following course:

(1) Swayne & Hoyt, Inc., Was Merely the Agent of the Owner of the "Camino".

(a) There was no evidence upon which the jury could find that Swayne & Hoyt, Inc., acted in any way with respect to the "Camino" except in the capacity of agent for the owner.

(b) Although an agent must disclose the identity of his principal, as well as the fact of his agency, it is a sufficient compliance with the rule if the agent discloses that he is agent "for the owners" of a vessel.

(c) Upon the law declared in the court's instructions, the jury should have been directed to find for the defendant. There was no evidence that Swayne & Hoyt, Inc., had any control "upon its own account."

(2) Swayne & Hoyt, Inc., Was Not Barsch's Employer.

(a) Swayne & Hoyt, Inc., did not deal with Barsch directly at all.

(b) Kennedy was merely "the sub-agent of the owner, through Swayne & Hoyt, Inc., its agent", and his only authority was to employ Barsch on behalf of the owner. He could not make a contract of employment for Swayne & Hoyt., Inc., with Barsch.

(c) The mate and master of the "Camino" were employees and agents of the owner, and could not employ Barsch in behalf of Swayne & Hoyt, Inc.

(3) Assuming That Swayne & Hoyt, Inc., Employed Barsch To Act as a Stevedore on the Dock, It Was Not Liable for The Negligence of the Winchman or Mate of the "Camino", Or For The Negligence of the Owner of the "Camino" in Failing to Supply a Watchman or a System of Signals.

(a) The winchman and the mate were employees of the owner—there was no testimony to the contrary.

(b) Under the uncontradicted evidence, the foreman, Dosch, had no control of the operations upon the vessel.

(c) When two masters engage in a common undertaking, one of them is not liable to his servant for an injury occasioned by a servant of the other.

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(1) SWAYNE & HOYT, INC., WAS MERELY THE AGENT OF THE OWNER OF THE "CAMINO".

(a) There was no evidence upon which the jury could find that Swayne & Hoyt, Inc., acted in any way with respect to the "Camino" except in the capacity of agent for the owner.

Mr. John G. Hoyt, the vice-president of Swayne & Hoyt., Inc., testified that he was familiar with the rela-

tionship of the defendant with the steamship "Camino" on March 31, 1913, and that "such relationship was that of managing agent" (Trans. p. 148).

Mr. A. A. Moran testified that he was manager of the shipping department of the defendant and that on March 31, 1913, "the defendant sustained the relation of managing agent for the Western Steam Navigation Company, owners of the 'Camino' " (Trans. p. 148).

Mr. R. H. Swayne, the president of the defendant, testified that on March 31, 1913, "the defendant sustained the relationship of agent for the Western Steam Navigation Company, owners of the 'Camino' " (Trans. p. 148).

We have already referred to the testimony of Kennedy upon this subject in our opening statement. Kennedy's final statement was that he considered Swayne & Hoyt, Inc., "as managing agents" (Trans. p. 24); "that as managing agents he represented them in Portland" (Trans p. 25); that he was really a sub-agent "through the agents of the owners, acting through the managing agents" (Trans. p. 27).

Dosch, the man who telephoned to the union and told Schneider to send Barsch and the other stevedores to the American-Hawaiian Dock to unload the "Camino", says that he did not tell Schneider that he wanted men to work for Swayne & Hoyt, Inc.; that he never did employ men for Swayne & Hoyt, Inc.; that it was his custom in ordering men

> "merely call for the men, say I want thirty men at seven o'clock at such and such a dock, for such

and such a steamer; whether the 'Camino', the 'Navajo' or the 'Paraiso', whatever ship wants men.'' (Trans. pp. 135, 136.)

Confirming this testimony of Dosch is the testimony of Schneider, who received the calls for stevedores at the union headquarters. Speaking of his understanding of the employment of men who went to various docks pursuant to his instructions after he had received a call for stevedores, Schneider said:

''Q. And when these men were sent down to the steamer by you, didn't you send a list of these men down for the timekeeper to make the roll by?

A. Yes, I sent a list of the men down there, yes, sir.

Q. And at the top of each list, you list them under the steamer, don't you? The steamer, not the dock, don't you? Isn't that the custom?

A. That would have no bearing——

Q. I asked you if it isn't true. I don't care whether you think——

A. Naturally. The custom of the port. You see, a man working in the office, and he gets a call for men; he sends them to the steamer direct, and directs the man what dock the steamer is located.

Q. Yes, that is all I want to know. What I wanted to know was what the fact was.

A. The steamer calls for the men.'' (Trans. p. 50.)

Barsch's own testimony cannot be taken as testimony to the effect he was actually employed by Swayne & Hoyt, Inc. As we have already pointed out in our opening statement, Barsch's repeated statements that he was employed by the plaintiff in error amounted to nothing more than Barsch's own conclusion based upon two circumstances. Barsch testified that he was sure he

was employed by Swayne & Hoyt, Inc., notwithstanding the fact that at an earlier date he was shown to have verified a complaint in which he swore his employment at the time he was injured was by the American-Hawaiian Steamship Company. The following extracts from Barsch's testimony show that his statement as to his employment by Swayne & Hoyt, Inc., was merely such conclusion:

"Q. Who told you that you were going down there to work for Swayne & Hoyt?

A. I seen Swayne & Hoyt's name on the bow of the 'Camino'.

Q. And when you saw that name on the 'Camino', that is the way you knew you were working for Swayne & Hoyt?

A. Why, certainly, must be the way. If you see a name on the ship, that is the company.

Q. Well, you saw the name there, but as I understood it, that name said 'Manager'. It didn't say they operated the boat for themselves, but said 'Manager', didn't it? Didn't it say 'Swayne & Hoyt, Managers'?

A. Swayne & Hoyt, Managers?

Q. Swayne & Hoyt, Managers.

A. I guess it may be that. I only looked at the Swayne & Hoyt name. May be Swayne & Hoyt, Managers.

Q. So you were sure you were working for Swayne & Hoyt?

A. Yes.

* * * * * *

Q. * * * Now, you weren't so sure whether Swayne & Hoyt when you sued the American-Hawaiian Steamship Company, were you?

A. I wasn't so sure.

Q. Then why did you say awhile ago, you knew it was Swayne & Hoyt?

A. I knew it was Swayne & Hoyt—I seen the name on it." (Trans. pp. 89, 90, 92, 93.)

The first basis for Barsch's conclusion was, it is apparent from the foregoing testimony, the fact that he saw the sign upon the bow of the "Camino". The second basis for his conclusion was, according to his testimony, something that occurred weeks after the happening of the accident, namely, the alleged dealings which he had with Swayne & Hoyt, Inc., with relation to his alleged injuries. This is made to appear in the following portion of his examination:

> "I was working for Swayne & Hoyt, I found out afterwards." (Tr. p. 96.)
>
> * * * * * *
>
> "Q. You thought you would sue both companies?
> A. I didn't know exactly whether they were operated by Hawaiian Company, or whether they were operated at that time directly by the Swayne & Hoyt people.
> Q. And you found you were mistaken about the American-Hawaiian people, is that right?
> A. I was mistaken.
> Q. And you might just as easily be mistaken now about Swayne & Hoyt?
> A. No.
> Q. Why shouldn't you?
> A. No, no mistake there.
> Q. What difference can there be?
> A. The difference be because they acknowledged they had; they acknowledged it?
> Q. When did they acknowledge it?
> A. In San Francisco, when I was there." (Trans. pp. 94, 95.)

In the foregoing we have the version of every individual who could possibly have had anything to do with the employment of Barsch upon the 31st day of March, 1913, to assist in the unloading of the "Camino". Before any connection can be established between Barsch

or the intermediary actors in the transactions, namely, Schneider and Dosch, it is necessary to show that Kennedy was the agent of Swayne & Hoyt, Inc. We find Kennedy testifying that he was not the agent of Swayne & Hoyt, Inc., but that through Swayne & Hoyt, Inc., he was the sub-agent of the owner of the "Camino". Kennedy had no direct dealing with Barsch prior to the accident. We then find that Dosch, who telephoned the union for the men, positively swore that he did not mention Swayne & Hoyt's name; that in all of his course of dealings with the stevedores he had never employed men for Swayne & Hoyt, Inc. We think it well here to quote Dosch's description of his transactions with the stevedores. Dosch testified:

> "Q. State to the jury what is the method by which you employ men, or by which you send orders to the secretary for men to come down to the dock.
>
> By Mr. GILTNER. I think he should ask what he did at this time, at the employment of Barsch, instead of going over the whole thing.
>
> Q. Very well, then, I will try to state it definitely. Can you recollect the procedure you went through in securing men to come down to the wharf to work on the steamship 'Camino' about the 31st day of March, 1913?
>
> A. Well, we always used just one system, that is, if we want longshoremen; when ordered to get longshoremen, or need them myself, I usually telephone or call at the hall, and get hold of the business agent of the union, and tell him I want so many men to work, such and such a boat, at such and such an hour, whatever it may be.
>
> Q. In any of these interviews which you have had, either personally or by telephone, with the business agent, did you represent to the business agent that you wished men to work for Swayne & Hoyt?

A. Not necessarily, no, sir. At no time; never did.

Mr. GILTNER. What was that answer? Not necessarily?

A. No, sir; never did.

Q. Did you ever employ men for Swayne & Hoyt?

A. No, sir, not that I know of.

Q. What is your best recollection of the 31st day of March, 1913? Did you employ men for Swayne & Hoyt that day?

A. Well, I couldn't say, because I never do use any name at all. Never even used American-Hawaiian Steamship Company when I order men; merely call for the men, say I want 30 men at seven o'clock at such and such a dock, for such and such a steamer; whether the 'Camino', the 'Navajo', or the 'Paraiso', whatever ship wants men.'' (Trans. pp. 134, 135, 136.)

According to Dosch, therefore, Swayne & Hoyt, Inc., did not enter into the transaction either as principal or agent.

Schneider, who received Dosch's message, testifies as follows:

''Q. State if you had anything to do with the hiring of the men for the unloading of the steamship 'Camino'?

A. Yes, sir. I had.

Q. On the 31st day of March, 1913, and with whom, and tell what took place.

A. Well, Mr. Dosch phoned for the men——

Q. What is that?

A. Mr. Dosch.

Q. What was the conversation that took place between you?

A. He wanted so many men for the dock, and so many men for the ship. You see the ship carries a crew of eight, you know, and they always want a

few extra longshoremen, you know, to work in the hold with the sailors, to make up two gangs.

Q. Did Mr. Dosch say for whom these men were, or anything? What was the conversation?

A. The conversation was that he wanted so many men down there on the Swayne & Hoyt dock, the American-Hawaiian dock, or Swayne & Hoyt boat.

Q. Who for? What for?

A. The Swayne & Hoyt people.

Q. And for what purpose?

A. For discharging the vessel.

Q. For the Swayne & Hoyt people?

A. Yes, sir.'' (Trans. pp. 40, 41.)

This testimony is qualified, however, by Schneider, who later said: ''The steamer calls for the men'' (Trans. p. 50).

Finally, we have Barsch's version of his employment. As we have said, Barsch's repeated statements that he was employed by Swayne & Hoyt, Inc., were shown to have rested upon two circumstances, neither of which afforded legal justification for a finding that Barsch's employment was by Swayne & Hoyt, Inc.

The statements by Schneider and Barsch are the only statements in the record which we have been able to find which bring Swayne & Hoyt, Inc., into the transaction of Barsch's employment in any capacity whatsoever; that is to say, either in the capacity of agent or of principal. But giving these statements by Schneider and Barsch, qualified later though they were, the fullest possible effect, they were not evidence of an employment by Swayne & Hoyt, Inc. *''upon its own account''*. Schneider did not say that when Dosch telephoned for the men to go to the Swayne & Hoyt dock to work ''for

the Swayne & Hoyt people", Dosch told him that Swayne & Hoyt, Inc., were employing Barsch, or the other stevedores, itself and "on its own account". He did not know, and he did not say he knew, that Swayne & Hoyt, Inc., were acting as independent employers; on the contrary, Schneider later affirmed that the men were called for ordinarily by the ship.

Neither was Barsch's testimony, which we have shown to have been based upon erroneous conclusions, to the effect that he was working for Swayne & Hoyt, Inc., as principal, rather than as agent.

One additional fact in the record, however, is conclusive against the claim that the testimony of these two men should be held sufficient to show an employment by Swayne & Hoyt, Inc., in its individual capacity. The pay-roll which Barsch signed on this occasion, as on many other occasions, and which it was shown had been in common use for some time, was conclusive evidence that whatever contract these men made, either with Kennedy or with Dosch, or with Swayne & Hoyt, Inc., was a contract of employment between the men and the owner of the "Camino". Whosoever consummated that contract between the stevedores and the owner, whether it were Kennedy or Dosch or Schneider, consummated it acting in behalf of the owner of the vessel. The receipt read as follows:

> *"Received from Captain....., for account of above steamer and her owners."* (Trans. p. 26.)

This receipt was absolute notice to all the men that their employment was by and on behalf of the owner

of the "Camino". It was absolute evidence, binding upon Barsch, that he was paid by the owner.

(b) Although an agent must disclose the identity of his principal, as well as the fact of his agency, it is a sufficient compliance with the rule if the agent discloses that he is agent "for the owners" of a vessel.

It is the general rule that an agent, if he would avoid liability upon a contract which he enters into in his capacity as agent, must disclose not alone the fact of his agency, but the identity of his principal. But it is unnecessary in all cases that the agent should give the *name* of his principal in order to avoid liability upon the contract. The identity of the principal may be disclosed "by description as well as by name", and, under this rule, it has been held directly that there has been a sufficient disclosure where an agent makes a contract "for the owners of a ship".

I Mechem on Agency, Second Edition, Paragraph 1412, p. 1042.

> "The identity of the principal may be disclosed by description as well as by name, as where the agent made a contract 'for the owners' of a ship named; and the agent may sufficiently exclude personal responsibility by expressly stating that the contract is made for and on account of his principal, although the principal is not directly named."

A direct application of the rule above stated to the facts of the present case is found in the case of

Waddell v. Mordecai, 3 Hill (S. C.) L. 22.

In that case the defendant, Mordecai was captain of the brig "Enconium". He entered into a contract with

the plaintiff to transport twenty-five or thirty slaves from Charleston to New Orleans, and received on account of the fare one hundred dollars, giving the owners the following receipt:

> "February 1, 1834. Received from Mr. Waddell one hundred dollars, on account of passage of slaves on board the brig 'Enconium'. For the owners.
> (Signed) M. C. Mordecai."

The vessel was lost through the negligence of the captain and, although the slaves were saved, they escaped. The action was brought to recover the one hundred dollars which the plaintiff had paid Mordecai. It was held that the money was received by Mordecai "for the owners", and, although he did not disclose the names of the owners of the "Enconium" to the plaintiff, and although the plaintiff did not know the names of the owners, nevertheless, there had been a sufficient disclosure of Mordecai's principals to avoid the rule that the agent of an undisclosed principal is liable to the party with whom he has attempted to deal for his principal. In dealing with the question as to whether there had been a sufficient disclosure by Mordecai of his agency, the court said:

> "What are the facts on this side of the case? Since the verdict, it cannot be questioned that Mordecai paid over the hundred dollars, advanced by Waddell, to the owners of the brig; that he received no timely notice to retain the money; that he acted throughout in good faith; and in the whole transaction appeared as the certain agent of the owners of the brig, though they were not specifically named. Under these facts the decision depends upon the following general rule—'Standing,' (says Chanc. Kent, 2 vol. 630, 2d ed.) 'on strong founda-

tions and pervading every system of jurisprudence —That where an agent is duly constituted, and names his principal, and contracts in his name, the principal is responsible and not the agent,' &c, &c. 'If he, (the agent) makes the contract in behalf of his principal, and discloses his name at the time, he is not personally liable,' &c. Under this general rule, the questions recur,—Did Mordecai name his principal. The answer is, he entered into the contract as agent for the owners of the 'Enconium'—but he did not express or give their paternal or Christian names. Now, is such fullness and precision indispensable, where the communication made is intelligible? I concede that every agent must so disclose his principal at the time of the contract, as to enable the opposite party to have recourse to the principal, in case the agent had authority to bind him, 2 Kent. 631. But I cannot perceive wherein lies the necessity of the agent naming, specifically and severally, every one of a class or company of his principals who are usually designated among men of business by some brief descriptive terms. For instance, were an agent to say, 'the work is to be done for the steamer "Etiwan", and I am the captain, or for the owners of Fitzsimons' wharf', this would be enough prima facie, unless, or until, the agent be called on for a more precise specification of the names of his principals. To require more in every instance, would be very often to require matter utterly superfluous. We have illustrations, that the rule, so construed, is a safe one, in the common practice of clerks of stores, who, perhaps every day, procure goods at a neighboring store, with the laconic expression, 'They are for our house', or the like. That time is equal to money, and business briefly told saves it, are rules drawn from experience, and are at the bottom of such practical brevity; and the frequency of this practice illustrates satisfactorily the received meaning of the rule of law now before the court. It is emphatically

one of every day business, and should be construed with a view to daily convenience.

The agent who communicates plainly, that he acts for another person, informs the party with whom he deals, that he does not intend to be himself responsible. And if he designates intelligibly the party to whom recourse is to be had, he gives the information necessary for the free use of the judgment and discretion of the party dealing with him; and has done his office in this respect for the ordinary purposes of business. As to express adjudications on the precise point, I admit that we have none which might go so far as to declare that an agent need not be plenary and precise in naming all his principals, although they are numerous. But rules for practical business, are rules of convenience and safety for ordinary men. We want them for convenient application to our habitual business. We must, therefore, consult convenience, safety and ordinary business, in applying such rules to practice. * * * It seems to me then very plain, that upon a just exposition of the rule, where more precise information is wanted than that of a general designation of the principal made at the time of the contract, and which may be required, in the course of events, in order to proceed in a suit against the principal, or for, other purposes, such extra information should be sought for by the party requiring it; and if the agent refuses to give it, he may be still liable; and this is the meaning of the judge in the case of *Owen v. Gooch.*"

While the case just cited directly covers the case before us, there are not wanting other applications of this rule. In

Lyon v. Williams, 71 Mass. 557,

a contract was involved which had been entered into by the agent of certain railroad corporations who signed

his name at the foot of the contract, "G. Williams, Jr., For the Corporations". The contract was a contract of carriage and was entered into between the plaintiff and Williams, the latter acting as agent for certain connecting carriers between Boston, Mass., and Zanesville, Ohio. The names of the carriers were nowhere mentioned in the body of the instrument and it was shown that there were many lines between Zanesville and Boston which might have been meant by the term "for the corporations". Nevertheless, the court held that there had been a sufficient disclosure by Williams of the identity of his principal to exonerate him from liability as an undisclosed agent. The court said:

> "The case stated is clearly a case of agency, and that agency disclosed upon the face of the contract. Such being the case, the action for any breach of the contract should be brought against the principal.
>
> No doubt, in many cases, the agent, by the recitals in the contract and by the form of his signature to the contract, imposes upon himself the responsibility of the performance of the contract. But here the written contract is in direct terms that of others, and not of the defendant. 'The several railroad companies between Boston and Zanesville agree', and the defendant signs 'for the corporations'. The contract also limits the extent of the liability of each of the railroad corporations to its own line.
>
> But it is said that the names of these corporations are not stated. This is true; but they are capable of being made certain by proper inquiry, and the plaintiff was content to take a contract thus generally designating the parties with whom the liability was to rest for the safe and proper conveyance of the goods. If we are correct in the

> view we have taken as to who are the parties to the contract, no difficulty arises as to the other points taken by the plaintiff. If the defendant, as servant of the railroad corporation which first received the goods, and whose duty it was to carry them safely to the line of the next railroad company on the route and properly deliver them, has been guilty of any negligence in that respect, and has sent them forward on a wrong route, the proper party to be resorted to, in an action for damages for such negligence, is the principal, and not the agent."

In

Pike v. Ongley, 18 Queen's Bench, Div. 708,

it was held that a hop broker who made a sold-note "for and on account of owner", sufficiently disclosed his principal to escape liability as an undisclosed agent. The trial court held that the signature of the agent "for and on account of the owner" was a sufficient disclosure. Day, Justice, said:

> "It is clear from a series of decisions that where the contract sued upon has been made by a broker 'for' or 'for and on account of' an undisclosed or foreign principal, the broker is not primarily liable. That is the result of the decision in *Gadd v. Houghton* (3), where the Court of Appeal held that where the words 'on account of' were inserted in the body of a contract, the broker was not personally liable. That case is binding and conclusive, and we must hold that in the present case, where goods have been sold 'for and on account of' an owner (the owner not having been named), the brokers are not primarily liable. That is a convenient expression to use."

The case was taken to the Court of Appeal, and, in that court, Lord Esher, the Master of Rolls, and Fry,

L. J., held that the first conclusion of the trial court was correct, although the trial court erred in excluding evidence of a local custom which made the agents liable as principals.

The application of these authorities to the case at bar is patent. In the case at bar there was no written contract signed by Swayne & Hoyt, Inc., "as agent for the owners of the 'Camino'." We contend that there was no evidence whatever of any contract, parol or otherwise, between Swayne & Hoyt, Inc., as agent or as principal, and Barsch. Whatever contract might have been shown, however, must have rested in parol. This being the case, the contract was to be gathered from all available sources showing the situation, intention and dealings of the parties.

Upon the undisputed evidence, every one of the persons who had anything to do with the alleged contract between Swayne & Hoyt, Inc., and Barsch had a clear understanding that Swayne & Hoyt, Inc., was acting in all of its dealings with the "Camino" "as agent for the owner". Kennedy knew that Swayne & Hoyt, Inc., was the agent for the owner. He so testified, stating that he, himself, represented the owner as a sub-agent through Swayne & Hoyt, Inc., its agent. Kennedy, Dosch, Schneider and Barsch, himself, had absolute knowledge of this, because of the pay-roll. Schneider signed this pay-roll for various members of the stevedoring gang, and Barsch, himself, was shown to have signed the pay-roll many times prior to the employment during which he was hurt.

It appears as conclusively in this case that if Swayne & Hoyt, Inc., entered into any contract at all with Barsch it entered into it as agent for the owner of the "Camino" as it would have appeared if the contract had been in writing and had contained a statement that Swayne & Hoyt, Inc., signed it "as agents for the owners". Therefore, there having been a disclosure of the identity of the principal for whom Swayne & Hoyt, Inc., was acting, the rule of the above cases governs, and plaintiff in error cannot be held liable to Barsch.

(c) Upon the law declared in the court's instructions, the jury should have been directed to find for the defendant. There was no evidence that Swayne & Hoyt, Inc., had any control "upon its own account".

An analysis of the district judge's charge to the jury discloses that the learned judge told the jury—

1. That under the undisputed evidence Swayne & Hoyt, Inc., was not the owner or charterer of the "Camino", but was "the managing agent" for the owner of the "Camino" (Trans. p. 160);

2. That the mere fact that Swayne & Hoyt, Inc., was the managing agent for the "Camino" would not render it liable to Barsch for the negligence charged in the complaint (Trans. p. 160);

3. That assuming Swayne & Hoyt, Inc., actually employed the plaintiff and actually employed and controlled the officers and crew of the "Camino", nevertheless, Swayne & Hoyt, Inc., would not be liable to the plaintiff unless it employed the plaintiff and unless it employed

and controlled the officers and crew of the "Camino" *"on its own account"*, as distinguished from its capacity as managing agent. In this regard, the court said:

> "Before they could be held responsible for an accident occurring on the boat, it must appear that they themselves, on their own account, were in charge of the boat at that time, operating it and directing the men and the course of procedure, and that through some negligent act of theirs the injury occurred, and unless that appears in this case, then there is no liability against Swain & Hoyt, whatever liability there may be against other parties." (Trans. p. 162.)

Again, the court told the jury:

> "You are instructed, as I have said, that if they were the mere managing agents acting for the owners and not for themselves, there is no legal liability against them in this case, unless you should find from the testimony that they were, on their own account, in charge of this vessel at the time of this accident or controlling the movement of these men for themselves and not for their principals, and upon this question the burden of proof is upon the plaintiff to prove that defendant, Swain & Hoyt, was not only the employer of the plaintiff, but that they were in charge and in control of the method of handling the cargo, and unless he has satisfied you by a preponderance of the proof upon this question, then you have no further concern with this litigation. It would simply be a case where the liability, if there is any liability, is on behalf of some one else other than the defendant in this case.
>
> If, however, you should find that Swain & Hoyt were in control of this vessel at the time of this accident, on their own account, and that by reason of that fact they are liable for this injury, if there

> was an injury, and if anybody was injured, then it will be necessary for you to consider the other phase of this case." (Trans. pp. 163, 164.)

Under the law declared in the foregoing instructions, the jury was told that Swayne & Hoyt, Inc., was not liable to Barsch unless it exercised control over the unloading of the "Camino" and exercised it not in the capacity of agent for the owner of the "Camino", but on its own account. We submit that there is not one iota of evidence in the record that Swayne & Hoyt, Inc., had any connection whatever with the "Camino" except as agent for the owner. Not one witness so testified. Barsch and Schneider testified that they thought Barsch's employment was by Swayne & Hoyt, Inc., but they did not pretend to say whether Swayne & Hoyt, Inc., was acting as an agent or "on its own account". On the other hand, all of the other witnesses testified emphatically that Swayne & Hoyt, Inc., had nothing to do with the "Camino" whatever, except as agent for the owner of the "Camino".

(2) SWAYNE & HOYT, INC., WAS NOT BARSCH'S EMPLOYER.

(a) Swayne & Hoyt, Inc., did not deal with Barsch directly at all.

The office of Swayne & Hoyt, Inc., was in San Francisco. Barsch never saw any officer of the company until weeks after the accident. Unless Kennedy was the agent of Swayne & Hoyt, Inc., no contractual relation could have arisen between Barsch on the one hand and Swayne & Hoyt, Inc., on the other.

(b) Kennedy was merely "the sub-agent of the owner, through Swayne & Hoyt, Inc., its agent", and his only authority was to employ Barsch on behalf of the owner.

Kennedy, as we have shown, is relied upon to establish a contract of employment between Swayne & Hoyt, Inc., and Barsch. If we can establish, therefore, that Kennedy was never constituted the agent of Swayne & Hoyt, Inc., we shall have answered the contention that any contract of employment entered into by him would be binding upon Swayne & Hoyt, Inc. Hoyt, Swayne and Moran testified positively that Swayne & Hoyt, Inc., never employed Kennedy as its agent. Kennedy, himself, testified upon cross-examination that all of his dealings with Swayne & Hoyt, Inc., were with it as the agent for the owner of the "Camino". We have already referred to his final statement that he was a "sub-agent for the owner through Swayne & Hoyt, Inc., its agent".

Upon the authorities which we have referred to under the last subdivision, there was a sufficient disclosure of the identity of Swayne & Hoyt, Inc.'s principal to prevent Swayne & Hoyt, Inc., from being liable upon any contract entered into on their behalf. Consequently, although Kennedy did not know the names of the owners of the "Camino", nevertheless, Swayne & Hoyt, Inc., would not be liable upon its own account to Kennedy by reason of the contract which it entered into with Kennedy as agent for the owner of the "Camino". The result is that if a contract of agency was entered into by Swayne & Hoyt,

Inc., and Kennedy, that contract was entered into by Swayne & Hoyt, Inc., as agents for the owner. Under it Kennedy became agent for the owner of the "Camino" and not agent for Swayne & Hoyt, Inc. As Kennedy was thus not an agent for Swayne & Hoyt, Inc., he could not have made any contract of employment with Barsch, or anyone else, which could be binding upon Swayne & Hoyt, Inc.

(c) The mate and master of the "Camino" were employees and agents of the owner, and could not have employed Barsch on behalf of Swayne & Hoyt, Inc.

The evidence was uncontradicted that Swayne & Hoyt, Inc., did not employ the officers and crew of the "Camino". The district judge so instructed the jury, saying:

> "Now, there is no evidence in this case as I recall it, that the master or officers of this vessel were employed by Swain & Hoyt on their own account. There is some testimony indicating that they were employed by this firm, but unless there is testimony tending to show that they were employed on account of Swain & Hoyt, the inference would be, since they were agents for the owners, that they were employing them for the owners of the vessel and that they became the agents and employes of the owners of the vessel and not Swain & Hoyt." (Trans. pp. 165, 166.)

This being the case, the master or mate of the vessel could not have made a contract of employment with Barsch on behalf of Swayne & Hoyt, Inc. Indeed, there was no attempt to put in any evidence showing this to have been the fact.

(3) ASSUMING THAT SWAYNE & HOYT, INC., EMPLOYED BARSCH TO ACT AS A STEVEDORE ON THE DOCK, IT WAS NOT LIABLE FOR THE NEGLIGENCE OF THE WINCHMAN OR THE MATE OF THE "CAMINO", OR FOR THE NEGLIGENCE OF THE OWNER IN FAILING TO SUPPLY A HATCH TENDER OR SYSTEM OF SIGNALS.

(a) The winchman and the mate were employees of the owner—there is no testimony to the contrary.

We have already shown that the court instructed the jury that there was no evidence that Swayne & Hoyt, Inc., employed the crew of the 'Camino''. How clearly the line is marked is shown in the testimony of the timekeeper, Williams, who said that when the pay-roll was made up he only kept the time of the longshoremen and not of the ship's crew (Trans. p. 133). It is true that Kennedy made the statement that Swayne & Hoyt, Inc., would direct the operations of the officers and crew of the ''Camino'' (Trans. p. 33), but, upon cross-examination, he completely retracted this statement.

> ''Q. Now, from some of the questions just asked you a few minutes ago, Mr. Kennedy, respecting the appointment of officers and master and crew, you don't want this jury to understand you know whether or not Swayne & Hoyt appointed these men?
>
> A. No, sir.
>
> Q. You don't know anything about that, do you?
>
> A. No, sir.
>
> Mr. GILTNER. What was the answer you made?
>
> A. I don't know for certain that Swayne & Hoyt employed the master of the 'Camino' or any other of their ships.

Q. And you don't know anything about the appointment of a master?

A. No, sir.

Q. Don't know who employed them or for what purpose?

A. No, sir." (Trans. p. 36.)

We think it will not be controverted that there is no evidence in the record that would enable the jury to find that the winchman or the mate of the "Camino" were employees or under the control of Swayne & Hoyt, Inc.

The negligence upon which the plaintiff relied was:

First: Negligence in the operation of the winch upon the vessel; second, Negligence of the owner in failing to establish a system of signals or means of communication between the stevedores and the winchman; and third, Negligence of the owner in failing to station a hatch tender in a position where he could give signals.

The last two charges of negligence were clearly negligence imputable to the owner of the "Camino".

The testimony as to the negligent operation of the winch placed the responsibility of the accident either upon the shoulders of the mate of the "Camino" or of the winchman. Barsch, himself, testified that "this winch driver went ahead without any notice, didn't give us any notice at all" (Trans. p. 77). The witness Ferguson concurred with Barsch in this statement, thus placing the responsibility upon the winchman (Trans. p. 71). The witness Wolff who worked by the side of Barsch testified, however, that just before the accident the mate of the "Camino" walked along

the dock and gave a signal to the winchman to go ahead (Trans. p. 58).

It is immaterial, however, whether the responsibility rested with the mate or the winchman of the "Camino". Both were employed by the owner of the "Camino". Neither had any connection whatever with Swayne & Hoyt, Inc., nor were either of them employees of that company.

(b) The evidence is uncontradicted that Kennedy and Dosch were without authority to control what was done on board the "Camino".

We shall quote direct from the record to establish this point. Kennedy testified as follows:

> "Q. Now, in connection with these matters Mr. Kennedy, do you mean the jury to understand from your testimony that you, as local representatives of the managing owners, would have had the right to go down there and direct the captain how to handle his tackle?
>
> A. No.
>
> Q. That is, you were not in active control of the ship's tackle, were you?
>
> A. No, sir.
>
> Q. And Swayne & Hoyt were not through you in that control?
>
> A. No.
>
> Q. So you had no control of handling the cargo as the ship handled it over the ship's rail?
>
> A. No.
>
> Q. That was done wholly, then, by the ship and her officers?
>
> A. Yes, sir.
>
> Q. And they were under the control of the master, were they not?
>
> A. Yes, sir.

Q. And he represented the owners?

A. Yes, naturally.

Q. Now, who operated the winches, do you remember? Men from the ship or men from the Union?

A. I don't know. It was customary for the men from the ship to operate them.

Q. And the 'Camino' was usually operated by her own winches, is that true?

A. Yes, yes.'' (Trans. pp. 27, 28.)

Kennedy further testified that he could not have caused the installation of a system of signals upon the ''Camino''. Upon this point, he testified as follows:

''Q. Now, along that same line Mr. Giltner's complaint or Mr. Barsch's complaint in this matter, has three general specifications of negligence. I want to know whether or not you or any one here representing Swayne & Hoyt could have remedied these conditions. Could you have gone down there, and given instructions regarding a system of signals?

A. No, sir.'' (Trans. pp. 36, 37.)

He also testified that he could not have compelled the master of the ''Camino'' to employ a hatch tender. Upon this point, his testimony was as follows:

''Q. There is also an allegation of negligence in neglecting and failing to furnish a hatch tender or signal man. Could you or any man here representing Swayne & Hoyt, determine whether they should put a signal man on there, or must that come from other sources?

A. I couldn't.

Q. It was no part of your duty to determine whether to put a hatch tender or signal man there?

A. No, sir.

Q. That is also wholly up to the officers of the ship?

A. Yes, sir." (Trans. p. 37.)

Dosch testified that he had no control as to the method of unloading the cargo from the ship's hold, but that the authority in that regard was vested in the officers of the ship. He likewise said that it would have been beyond his power to have compelled the captain to employ a hatch tender or install a system of signals. His testimony was as follows:

"Q. Your work is general wharf man around there?

A. I am considered chief wharf man down there.

Q. As such chief wharf man, Mr. Dosch, would it have been any of your duty to have instructed the officers or members of the crew, as to what system of signals they should use in unloading the cargo from the ship's hold?

A. No, sir.

Q. Who had charge of the direction of unloading the cargo from the ship's hold?

A. The officers of the ship.

Q. Would it have been any part of your duty to have indicated to the captain that he should put a hatch tender or signal man on the steamer 'Camino'?

A. No, sir.

Q. If you had indicated to the captain that he should put a hatch tender or signal man on the 'Camino', would your orders have been obeyed?

A. I couldn't give orders.

Q. Why not?

A. Because he was in charge of the ship; I had nothing to do with it." (Trans. p. 136.)

Barsch, himself, testified that he took orders from Ahlin, the first mate, as well as from Dosch:

"Q. Who was the dock foreman over you?
A. Mr. Dosch.
Q. And who was the general superintendent over all of you there?
A. The first officer.
Q. Whom did you say?
A. The first officer—the name was Ahlin.
Q. The mate?
A. Yes, the mate.
Q. Did you take orders from him?
A. Yes.
Q. And also from Mr. Dosch?
A. Yes." (Trans. p. 83.)

The foregoing testimony was uncontradicted. It establishes conclusively that neither Kennedy nor Dosch exercised any control over the officers or crew of the "Camino" or over the operation of the winch upon the "Camino", nor could either of them have had any power to say whether a system of signals should be installed upon the "Camino" or a hatch tender employed thereon. It being shown that they did not exercise such control or power at all, Swayne & Hoyt, Inc., cannot be held responsible for their failure to act, under any possible theory. With the record in this condition, we may therefore assume, for the purposes of argument, that Kennedy and Dosch actually became the agents of Swayne & Hoyt, Inc. If we assume this for the purposes of the argument, the case becomes the ordinary case of a vessel employing stevedores to assist in the unloading upon the wharf and supplying its own hoisting apparatus and its own employees upon the deck of the vessel. In other words, if Swayne & Hoyt, Inc., be deemed as the employer of Barsch

and the other stevedores who were engaged upon the dock in unloading the "Camino", nevertheless, it cannot be held responsible for negligence of employees of the owner of the "Camino" engaged in operations taking place upon the deck of the vessel.

(c) When two masters engage in a common undertaking, one of them is not liable to his servant for an injury occasioned by a servant of the other.

The principle stated in the foregoing heading has been applied on numerous occasions to the relation between stevedores engaged by an independent contractor to assist in unloading a vessel and winchmen employed upon and by the vessel itself. In such cases it has been repeatedly held that where the winchman is negligent and a stevedore upon the dock is injured, the winchman is not a fellow servant of the stevedore and the liability rests with the owner of the vessel. Such was the conclusion of this court in

The Boveric, 167 Fed. 520.

It was there held:

> "Where a charter party required the ship to furnish the power, winch, and winchmen for discharging cargo, that is the contribution of the vessel to the common work of discharging, and a winchman so furnished is not a fellow servant with the men of a stevedore, employed by the charterer to do the other part of the work, although the foreman of the stevedores gives the signals for the movements of the winch; and for the negligence of a winchman, resulting in injury to one of such men, the vessel is liable."

Numerous decisions by the federal courts are in accord with the rule of *The Boveric,* supra.

The Slingsby, 120 Fed. 748;
The Gladestry, 128 Fed. 591;
The City of San Antonio, 135 Fed. 879; 143 Fed. 955;
The Lisnacrieve, 87 Fed. 570;
The Victoria, 69 Fed. 160;
Standard Oil Co. v. Anderson, 152 Fed. 166.

See, also, affirmed 212 U.S. 216.

Johnson v. Netherlands-American Steam Navigation Co., 30 N. E. 505, New York Court of Appeals, 1892.

The basis of the rule is well stated by Judge Lacombe, speaking for the second circuit, in 1903, in *The Slingsby,* supra, as follows:

> "It is well settled that A. and B. may by their respective servants undertake the doing of some particular work, each selecting and paying his own servants, and retaining the right to discharge them from service for proper cause. In such case each servant remains in law the servant of his particular employer, and the circumstance that they all work at the same time and that the orders which direct the joint application of their individual energies are given by some one foreman or overseer or director, does not change their legal relations."

In the foregoing cases a rule of general application is applied to the precise state of facts which, for the purposes of the argument, we are assuming to exist in the case at bar. Thus, if we assume that Kennedy

and Dosch became agents of Swayne & Hoyt, Inc., it is shown that neither of them had any authority beyond the employment of Barsch and the other stevedores upon the dock at which the "Camino" was unloading. Neither Kennedy nor Dosch had any authority to control the winchman or the mate of the "Camino" or to insist upon the adoption of any rules or system of signals upon the "Camino", or to insist upon the employment of a hatch tender thereon. If, therefore, it be assumed that Swayne & Hoyt, Inc., acted through Kennedy or Dosch, no more can be claimed than that Swayne & Hoyt, Inc., occupied the position of an independent contractor who had engaged to furnish stevedores upon the dock to assist in the unloading of the "Camino".

Viewed in this light, the application of the rule which we have discussed becomes apparent. Treated as an employee of Swayne & Hoyt, Inc., Barsch was not a fellow servant of the mate or winchman of the "Camino". Although he was employed in a common undertaking with them, neither the mate nor the winchman was in the employ of Swayne & Hoyt, Inc., and Swayne & Hoyt, Inc., could not control their actions, nor could it be held liable for their negligent acts.

B.

The Trial Court Erred in Applying the Employers' Liability Act of Oregon of 1911.

Our argument upon this point will take the following course:

(1) A Stevedore's Employment Is a Maritime Contract, and Is Controlled by the Maritime Law.

(a) A stevedore's employment is a maritime contract.

(b) The maritime law is to be applied in determining the obligations arising from a maritime contract, and a state legislature cannot enlarge such obligations, nor change the maritime law.

(2) The "Camino" Was Engaged in Interstate Commerce, and the Safety Appliance Features of the Oregon Employers' Liability Act of 1911 Cannot Be Applied to Her Without Violating the Interstate Commerce Clause of the Federal Constitution.

(a) Non-action by the Federal government will not permit state legislation directly or indirectly affecting interstate commerce in cases which "by their nature" require a uniform rule.

(b) The necessity for uniformity prohibits state action in respect to safety appliances on vessels engaged in interstate commerce.

(1) A STEVEDORE'S EMPLOYMENT IS A MARITIME CONTRACT, AND IS CONTROLLED BY THE MARITIME LAW.

(a) A stevedore's employment is a maritime contract.

That the contract of a stevedore is a maritime contract, and is governed by the maritime law, is now

regarded as settled. While a stevedore has a maritime lien for services only against a foreign vessel as distinguished from vessels in their home port, nevertheless it has been repeatedly declared in recent decisions of the federal courts that a stevedore's contract, whether with a foreign vessel, or with a domestic vessel in her home port, is to be regarded as maritime in its nature. In a recent decision by the Supreme Court of the United States, handed down in the October term, 1913, Mr. Justice Hughes has collated the numerous federal authorities upon the subject, and has laid down the law authoritatively.

Atlantic Transport Co. v. Imbrovek, 234 U. S. 52; 58 L. ed. 1208, 1212.

We quote from the opinion at page 1212.

> "We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners'."

Among the numerous declarations of federal judges upon the subject, none is referred to with greater frequency than that of Judge Deady in

The Canada, 7 Fed. 119, 124.

> "To my mind it is very plain that the services of a stevedore are maritime in their nature. A

voyage cannot be begun or ended without the stowing or discharge of cargo. To receive and deliver the cargo are as much a part of the undertaking of the ship as its transportation from one port to another. Indeed it is an essential part of such transportation. Freight is not due or earned until the cargo is, at least, placed on the wharf at the end of the ship's tackle. To say that the final delivery or discharge of the cargo is not a maritime service, because it is, or may be, performed partly on shore, is simply begging the question, as it is the nature of the service, and not the place where rendered, that determines its character in this respect."

See also

Benedict's Admiralty, 4th Edition, par. 207;
The Wivanhoe, 26 Fed. 927;
The Gilbert Knapp, 37 Fed. 209;
The Allerton, 93 Fed. 219;
The Seguranca, 58 Fed. 908;
The Worthington, 133 Fed. 725;
The Main, 51 Fed. 954;
Boutin v. Rudd, 82 Fed. 685;
The George T. Kemp, Fed. Cases 5341;
Norwegian S. S. Co. v. Washington, 57 Fed. 224.

It has been pointed out that although a stevedore may not in certain cases have a lien in admiralty for his services, his contract remains a maritime contract.

Boutin v. Rudd, supra.

It is our first contention that the relation of master and servant did not exist at all between Swayne & Hoyt and Barsch. But assuming, for the purpose of argument, that such a relation did exist, it is now apparent

that it existed, if at all, by reason of a maritime contract. It will, therefore, be our contention upon this point that the relation having been established by a maritime contract, the mutual obligations of the parties under that contract were governed by the maritime law. They could not be enlarged or changed by any statute of the State of Oregon.

(b) The maritime law is to be applied in determining the obligations arising from a maritime contract, and state legislation cannot enlarge such obligations or change the maritime law.

It is now well understood that the maritime law "which was familiar to the lawyers and statesmen of the country when the Constitution was adopted" became the law of the United States governing matters of maritime cognizance at the time of the adoption of the Constitution.

Section 2 of Article III, United States Constitution:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; * * * to all cases of admiralty and maritime jurisdiction. * * * "

What this maritime law which was thus adopted by the Constitution as the law of the United States was is defined by Mr. Justice Bradley in

Rodd v. Heartt (The Lottawanna), 21 Wall. 558; 22 L. ed. 654,

at page 662, as follows:

> "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction'."

By the ninth section of the Judiciary Act of 1879 (Section 711 R. S.), which has been carried into the present Judicial Code, the cognizance of all cases of admiralty and maritime jurisdiction is vested exclusively in the District Court. By a saving clause, however, there is saved to suitors "the right of a common law remedy, where the common law is competent to give it". But, as was pointed out by Mr. Justice Field in

The Moses Taylor, 4 Wall. 411; 18 L. ed. 397, 402,

the remedy thus saved to suitors "is not a remedy in the common law courts, but a common law remedy". In other words, suitors may go into a common law court, where such court is competent to afford a remedy, and enforce their rights in accordance with the maritime law. The proposition remains unchanged that as to all matters of maritime cognizance ~~and~~ the maritime law is to be applied.

The Moses Taylor, supra;
The Glide, 167 U. S. 606; 42 L. ed. 296;
Schuede v. Zenith S. S. Co., 216 Fed. 566.

The states are without the power to modify the maritime law, or to enlarge the rights or obligations arising

thereunder. This was pointed out by Mr. Justice Bradley in

The Lottawanna, supra:

"One thing, however, is unquestionable: the Constitution must have referred to a system of law coextensive with and operating uniformly in the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign States."

It is again made clear by Mr. Justice Bradley in

Butler v. Boston & Savannah S. S. Co., 130 U. S. 527; 32 L. ed. 1017, at page 1024:

"As the Constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction', and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the National Legislature, and not in the State Legislatures.
* * *

"The present case, therefore, is clearly within the admiralty and maritime jurisdiction. The stranding of the 'City of Columbus' took place on Devil's Bridge, on the north side of and near Gay Head, at the west end of Martha's Vineyard, just where Vineyard Sound opens into the main sea. Though within a few rods of the island (which is a county of Massachusetts) and within the jaws of the headland, it was on the navigable waters of the United States; and no state legislation can prevent the full operation of the maritime law on those waters."

In

Workman v. The Mayor, etc. of New York, 179 U. S. 552; 45 L. ed. 314,

the question was involved as to whether the maritime law or an ordinance of the City of New York governed and determined the liability of the City of New York for damages occasioned by the negligent operation of one of its fire boats. It was held by the Supreme Court that the City was responsible under the principles of the maritime law, and that such law could not be affected by an ordinance of the city. In arriving at this result the court said, speaking through Mr. Justice White:

> "The practical destruction of a uniform maritime law, which must arise from this premise, is made manifest when it is considered that if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one state and one in another; one thing in one port of the United States, and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing today and another thing tomorrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent. And the principle by which the maritime law would be thus in part practically destroyed would besides apply to other subjects specially confided by the Constitution to

the Federal government. Thus, if the local law may control the maritime law, it must also govern in the decision of cases arising under the patent, copyright, and commerce clauses of the Constitution. It would result that a municipal corporation, in the exercise of administrative powers which the state law determines to be governmental, could with impunity violate the patent and copyright laws of the United States or the regulations enacted by Congress under the commerce clause of the Constitution, such as those concerning the enrollment and licensing of vessels. This follows if a corporation must, for a wrong by it done, be allowed to escape all reparation upon the theory that, though ordinarily liable to sue and be sued, it possessed in the particular matter the freedom from suit which attaches to a sovereign state.

The disappearance of all symmetry in the maritime law and the law on the other subjects referred to, which would thus arise, would, however, not be the only evil springing from the application of the principle relied on, since the maritime law which would survive would have imbedded in it a denial of justice."

The necessary result of sanctioning any rule which would permit the states to abrogate, in part or in whole, the admiralty law, is made clear in the following language of Judge Storey in

The Chusan, Fed. Cas. 2717:

"In the exercise of this admiralty and maritime jurisdiction, the courts of the United States are exclusively governed by the legislation of congress, and in the absence thereof, by the general principles of the maritime law. The states have no right to prescribe the rules by which the courts of the United States shall act, nor the jurisprudence which they shall administer. If any other doctrine were established, it would amount to a complete sur-

render of the jurisdiction of the courts of the United States to the fluctuating policy and legislation of the states. If the latter have a right to prescribe any rule, they have a right to prescribe all rules, to limit, control, or bar suits in the national courts. Such a doctrine has never been supported, nor has it for a moment been supposed to exist, at least, as far as I have any knowledge, either by any state court, or national court, within the whole Union. For myself, I can only say that during the whole of my judicial life, I have never, up to the present hour, heard a single doubt breathed upon the subject."

Frequent reiterations of the proposition that states may not alter the provisions of the maritime law are found in the opinions of the judges of the various circuits.

The Manhasset, 18 Fed. 918:

"The states of this Union cannot create maritime rights, or rights of action in admiralty; nor can they endow with a maritime right one who is not entitled to that right by the law maritime."

Mack S. S. Co. v. Thompson, 176 Fed. 499.

In this case Judge Severens said, speaking for the judges of the Sixth Circuit:

"We think the maritime law subsists as an entirety as the subject of Federal jurisprudence, and is to be administered by the Federal courts without impairment by state legislation. If changes are to be made in it, it must be done by Federal authority."

In

Cornell Steamboat Co. v. Fallon, 179 Fed. 293,

Judge Ward, speaking for the judges of the Second Circuit, pointed out that the relations of parties arising

through a maritime contract were to be determined in accordance with maritime law, saying:

> "The contract between the defendant and the deceased is a maritime contract, and establishes their relation as well in courts of law as in courts of admiralty."

The basic principle declared in the foregoing authorities has been applied to the exclusion of the power of the states to enact employers' liability statutes affecting maritime contracts of employment. The most noteworthy of these cases is the case of

Schuede v. The Zenith S. S. Co., 216 Fed. 566,

decided by Judge Killits, of the District Court for the Northern District of Ohio, in June, 1914. The action was brought by Schuede, a seaman employed by the defendant company on the S. S. "Saxona", in the state court of Ohio to recover compensation in accordance with the Ohio Employers' Liability Act for injuries sustained by Schuede during his employment. The case was removed to the District Court on the ground of diversity of citizenship, and the defendant company pleaded in its answer that its contract of employment with Schuede was a maritime contract and was governed by the maritime law, and that, therefore, the Employers' Liability Act could not apply. The matter before the court was a motion to strike out these portions of the answer. The District Court denied the motion, holding:

> "The provisions of the law maritime as to the relation of a seaman to his employment are part of the substance and obligations thereof, which cannot be modified by state law; and in case of an

injury to a seaman in the course of his employment the maritime law determines his rights in an action to recover therefor, to the exclusion of the law of the state where the injury occurred and the suit is brought, whether it is brought in a state or in a federal court."

Judge Killits said:

"We agree with counsel for defendant that the principles of the general maritime law in force in the United States and not the subject of specific enactment by Congress are to be treated as if actually on the statute books. This must be construed to be the effect of section 2, article 3, of the Constitution, extending the power of the federal courts 'to all cases of admiralty and maritime jurisdiction', thus practically adopting the general law of admiralty as the law of this country, and such general law in force when the Constitution was adopted and not modified by act of Congress has the same force and is to be treated with the same consideration which must be given to statutes upon the subject. Murray v. Chicago & Northwestern Railroad Co. (C. C.) 62 Fed. 24; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654. A state may not pass any act which abridges or enlarges the responsibilities or duties of maritime law. Rights in admiralty cannot be affected by state enactment. * * *

"As we look at it, the provisions of the law maritime as to the relation of a seaman to his employment are part of the substance and obligations thereof, which cannot be modified by state law, even through recourse to the saving clause of the Code."

The same result was arrived at by Judge Hazel, speaking for the District Court for the Western District of New York in March, 1912, in

The Henry B. Smith, 195 Fed. 312.

It was there held:

> "A right of action for the recovery of damages for personal injuries not resulting in death, arising out of a maritime tort, depends upon the maritime law, which cannot be enlarged by a state statute to give a right of action in rem."

Judge Hazel said:

> "The maritime law, which the libelant invokes, cannot be altered, modified, or changed by state enactment. The right of action arising out of maritime tort, relating to the recovery of damages for personal injuries, depends upon the maritime law, which has been adopted by the laws and usages of the country. The Lottawanna, 21 Wall. 588, 22 L. Ed. 654. There is, moreover, no maritime lien by the statutes of this state to support this proceeding in rem, and I am constrained to hold that in an action for personal injuries the Employers' Liability Act of the state has no application. Rights of action in admiralty are sui generis, and controlled by the maritime law, save in case of death, wherein the states, by legislative enactments, have created liens and rights of action which are not inconsistent with the maritime law."
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> * * * * * * *
>
> "But there is no case which goes so far as to hold that the legislature of the state may modify, alter, or change the maritime law to the extent of enforcing a statute relating to proceedings in rem for personal injuries; and in the absence of controlling precedent I am disinclined to enlarge or expand the principles by which maritime torts are governed."

In two recent decisions not yet reported the Supreme Court of Erie County, New York, has held directly that the Employers' Liability Act of New York could not

be held to apply in cases arising out of injuries to employees under maritime contracts of employment.

In

Bach v. Western Transit Co.,

a fireman and member of the crew of the S. S. "Superior" sued to recover for injuries sustained by him during the course of his employment. The Supreme Court of Erie County nonsuited the plaintiff upon the ground that the employment of the plaintiff by the defendant was based upon a maritime contract, and that the state Employers' Liability Act had no application to the facts presented, but that the right of action was governed by the maritime law of the United States.

In

Knapp v. The U. S. Transportation Co.,

the plaintiff was employed as second mate on the defendant's vessel and sued to recover compensation for injuries sustained during his employment. The Supreme Court of Erie County, New York, tried the case upon the theory that the plaintiff's right to recover, if he had such right, was covered by the general maritime law of the United States and not by the New York Employers' Liability Act.

These cases have but recently been called to our attention by Messrs. Goulder, Day, White & Garry, of Cleveland, Ohio, the eminent counsel who briefed the law for the defendant in the Schuede case, supra. We shall take the liberty of furnishing the court and counsel with the citations at a later date.

The learned district judge, in the present case, refused to instruct the jury that the Employers' Liability Act of 1911 did not apply. On the contrary it will be found that he did instruct the jury altogether upon the theory that such act did apply (Tr. fols. 164, 166). Without discussing in detail the differences between the duty of the defendant to the plaintiff under the maritime law and under the Employers' Liability Act of Oregon of 1911, we refer the court to a copy of said act which is printed in an appendix to this brief, and to the maritime law upon the subject of the duties of the employer of a seaman to his employee, as declared in

The Osceola, 189 U. S. 158.

It will be found that the Employers' Liability Act which the court instructed the jury applied to the instant case abolishes the fellow-servant rule, the doctrine of the assumption of risk, and the doctrine of contributory negligence, and imposed safety appliance regulations, the violation of any of which it made to constitute a prima facie case of negligence. The jury was told, for instance, that it should find for the plaintiff if it should find from the evidence that the defendant had violated the provision of the act requiring a system of communications to be established between the stevedores and the operators of the winch upon the vessel.

Barsch's contract is shown to have been a maritime contract. Under the authorities cited, the obligation of Barsch's employer to him should have been measured by the maritime law. Under these authorities

the State of Oregon was without power to enlarge those obligations or to modify the maritime law. The Oregon statute which the trial court used as the basis of its instructions to the jury did away with defenses which the maritime law allowed, and created greater, if not altogether new, obligations upon the part of the employer.

(2) THE "CAMINO" WAS ENGAGED IN INTERSTATE COMMERCE AND THE SAFETY APPLIANCE FEATURES OF THE EMPLOYERS' LIABILITY ACT OF OREGON OF 1911 CANNOT BE APPLIED TO HER WITHOUT VIOLATING THE INTERSTATE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

Section 1 of the Oregon Employers' Liability Act of 1911 constitutes in itself a safety appliance act. We refer the court to the copy of the act set forth in the appendix to this brief where a detailed list of the particular regulations which this section prescribes may be found. Employers are required to make certain inspections and tests of various classes of machinery used in their business; they are required to secure scaffolding, staging and other structure in a particular manner; they are required to cover shafts, wells and floor openings; those using electric wires are required to color the supports or arms bearing live wires so as to distinguish them from supports bearing dead wires; finally, employers are required to see that "all machinery other than that operated by hand power shall, whenever necessary for the safety of persons employed in or about the same or for the safety of the general public, be provided with a system of communication by

means of signals, so that at all times there may be prompt and efficient communication between the employees or other persons and the operator of the motive power."

The "Camino" was conceded to have been engaged in interstate commerce. The question therefore arises as to whether or not a vessel engaged in interstate commerce can be subjected to such rigid and minute regulation as to its appliances by the authority of a state statute.

(a) Non-action by the Federal Government will not permit state legislation directly or indirectly affecting interstate commerce in cases which "by their nature" require a uniform rule.

The precise question before the court on this branch of the case is to determine whether or not a state may, without violating the interstate commerce clause of the United States Constitution, bring the instrumentalities of interstate maritime commerce within the scope of a state act containing stringent safety appliance provisions.

In other words, our precise contention is that the matter of safety appliances upon vessels engaged in interstate commerce is one of those matters which "by their nature" require a uniform rule, and is therefore one of those matters over which state legislatures have no control, *even in the absence of direct federal legislation.*

A state may not, of course, legislate *directly* upon any subject of interstate commerce; that is to say, it will be conceded that the State of Oregon could not have passed an act requiring safety appliances to be installed upon interstate carriers with the express view of regulating such carriers.

> "If a state enactment imposes a direct burden upon interstate commerce, it must fall, regardless of federal legislation." (Mr. Justice Hughes in the Minnesota Rate Cases.)

But it is equally well recognized that there is a certain field of action in which the enactments of state legislatures directed solely against intrastate commerce, but necessarily affecting interstate commerce, are upheld *in the absence of express federal enactment.* It is a familiar phrase that where Congress has not seen fit to exercise the federal power to regulate interstate commerce in a given particular, state action indirectly affecting interstate commerce in such a particular is proper.

It is within the exception to this last class of cases that we contend the regulation of safety appliances upon interstate vessels must be classed. That exception is stated as follows by Mr. Justice Hughes in the Minnesota Rate Cases:

> *Simpson v. Shepard,* 230 U. S. 352, 57 L. Ed. 1511, 1541.
>
> "It has been repeatedly declared by this court that *as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive.* In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act

> within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation."

This is but a branch of the larger rule laid down by Chief Justice Marshall in the famous case of

> *Sturges v. Crowninshield,* 4 Wheat. 122, 4 L. Ed. 529, p. 548.

> "But it has never been supposed that this concurrent power of legislation extended to every possible case in which its exercise by the states has not been expressly prohibited. The confusion resulting from such a practice would be endless. The principle laid down by the counsel for the plaintiff, in this respect, is undoubtedly correct. Whenever the terms in which a power is granted to Congress, or the nature of the power, required that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it."

The existence of this exception is developed in the leading cases in which state action was upheld.

In

> *Cooley v. Board of Wardens of the Port of Philadelphia,* 12 How. 299, 13 L. Ed. 996,

it was held that pilotage, being a matter of more or less local concern, and depending in many particulars upon local conditions, came within the category of those matters which the states might indirectly regulate in the absence of federal legislation upon the subject. But Mr. Justice Curtis, who wrote the opinion of the Supreme Court in that case, recognized that while the matter of pilotage was one of those in which state action was

permissible, there existed a class of cases in which the power of the federal government was exclusive. Thus, he says at page 1005:

> "Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; *some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port;* and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation."

A very recent illustration of what has been deemed by the Supreme Court to be a matter "by its nature" demanding federal regulation to the exclusion of the power of the state to regulate it is afforded in the case of

South Covington & C. S. R. Co. v. Covington,
35 Sup. Ct. Rep. 158,

decided January 5, 1915. In that case the City of Covington had sought to regulate in certain particulars the operation of a street railway which connected the City of Covington, in Kentucky, with the City of Cincinnati, in Ohio. It was held by the Supreme Court that the business of the company constituted interstate commerce. The Supreme Court then took up the question as to whether or not the regulations which the ordinance of the City of Covington attempted were such in their very nature as required a uniform federal action, or whether, on the other hand, they were of such a character as to permit local action in the absence of federal legislation. The Supreme Court held that a certain provision of the ordinance which made it unlawful for the company to permit more than one-third

greater in number of passengers to ride in its cars over and above the number for which seats are provided was a matter which by its very nature required exclusive federal control. It was pointed out that if the City of Covington should be permitted to legislate upon this matter, so also would be the City of Cincinnati necessarily be allowed to make a similar regulation, and that the sure result would be a conflict of requirements and an interference with interstate commerce. Mr. Justice Day said as follows upon this phase of the case:

> "In the light of the principles settled and declared, the various provisions of this ordinance must be examined. That embodied in sections 1 and 6 makes it unlawful for the company to permit more than one-third greater in number of the passengers to ride or be transported within its cars over and above a number for which seats are provided therein, except this provision shall not apply or be enforced on the Fourth of July, Decoration Day, or Labor Day, and by section 6 it is made the duty of the company operating the cars within the City of Covington to run and operate the same in sufficient numbers at all times to reasonably accommodate the public, within the limits of the ordinance as to the number of passengers permitted to be carried, and the council is authorized to direct the number of cars to be increased sufficiently to accommodate the public if there is a failure in this respect. To comply with these regulations, the testimony shows, would require about one-half more than the present number of cars operated by the company, and more cars than can be operated in Cincinnati within the present franchise rights and privileges held by the company, or controlled by it, in that city. Whether, in view of this situation, this regulation would be so unreasonable as to be void, we need not now inquire. These facts, together with the other details of operation

of the cars of this company, are to be taken into view in determining the nature of the regulation here attempted, *and whether it so directly burdens interstate commerce as to be beyond the power of the state.* We think the necessary effect of these regulations is not only to determine the manner of carrying passengers in Covington and the number of cars that are to be run in connection with the business there, but necessarily directs the number of cars to be run in Cincinnati, and the manner of loading them when there, where the traffic is much impeded and other lines of street railway and many hindrances have to be taken into consideration in regulating the traffic. If Covington can regulate these matters, certainly Cincinnati can, and interstate business might be impeded by conflicting and varying regulations in this respect, with which it might be impossible to comply. On one side of the river one set of regulations might be enforced, and on the other side quite a different set, and both seeking to control a practically continuous movement of cars. As was said in Hall v. De Cuir, 95 U. S. 485, 489, 24 L. ed. 547, 548, 'commerce cannot flourish in the midst of such embarrassments'.

"We need not stop to consider whether Congress has undertaken to regulate such interstate transportation as this, for it is clearly within its power to do so, and absence of federal regulation does not give the power to the state to make rules which so necessarily control the conduct of interstate commerce as do those just considered."

(b) The imperative necessity for uniformity prohibits state action in the matter of regulating safety appliances on vessels engaged in interstate commerce.

It is a short step from the state of facts presented in the *Covington* case, supra, to the state of facts pre-

sented in the case at bar. If the State of Oregon can require that all vessels touching at an Oregon port shall have a specified equipment of safety appliances, so also may the State of Washington and the State of California enact that such vessels shall have another and a different set or equipment of such appliances. Thus, it may come about that the owners of vessels, such as the "Camino" may find themselves subjected to terms of imprisonment or heavy fines should their vessels touch at a port in Oregon without first having been equipped with one set of safety appliances, and may again find themselves subjected to fine and imprisonment should their vessels touch at a port in Washington without first having been equipped in an entirely different manner. When we consider that the Oregon act goes so far as to compel the installation of wire supports of a certain designated color, it is apparent that only the greatest confusion and the greatest difficulty must necessarily attend the granting of such power to the various states. In the language of Justice Day, "Commerce cannot flourish in the midst of such embarrassments".

Leaving aside the connection of these regulations with maritime commerce, the very nature of the regulations themselves requires uniformity; but when we consider in addition that these regulations are imposed upon and interwoven with the maritime law, we are again reminded of the strictures of the learned judges who have repeatedly emphasized the necessity for uniformity in all matters associated with that maritime law. We refer to the language employed in the *Workman* case, in the

Lackawana and in the *Chusan,* quoted earlier in this brief, and to the following statement in

Benedict's Admiralty, 4th Ed., p. 412:

> "The wisdom of our ancestors, in laying the foundations of the republic, is in nothing more evident than in our organic regulations in relation to commerce. For all commercial purposes we must be one people; no different rules must be applied to our maritime commerce in the ports of the different states; perfect freedom and equality of trade and navigation among ourselves is constitutionally secure. If it had not been so, long before this time we should have been divided, weak and antagonistic nations, the fragments of our original Union. How easy it is to perceive that our harmony might be interrupted, and our strength impaired, if each state might adopt and enforce, on its half of a river, its section of a lake, its short stretch of coast, in its own ports and harbors and local waters, to which all the states have a common right of use, a system of commercial and maritime law, repealing, or conflicting with that great system of commercial law which is known as the admiralty and maritime law, and which alone can secure those equal state rights which it was one great object of the constitution to protect."

We are now considering not the effect which the Oregon act would have upon the maritime law, if it should be applied so as to destroy the defenses given by the maritime law in actions of this character, namely, the fellow servant rule, the doctrines of assumption of risk and contributory negligence, but the effect which it would have treated solely as a safety appliance act. However, the considerations which in the *Shuede* case, supra, led Judge Killits to construe the Ohio Employers' Liability Act as not covering contracts of maritime

employment, while based upon the effect of that act in destroying the defenses above referred to, are worthy of notice in this connection. Judge Killits said:

> "In construing a statute, it is the duty of the court to avoid, if it is reasonably possible, that interpretation which works out inequality, inconvenience or absurdity. A construction involving consistency, equality and convenience of those affected, and consonance with the spirit of the law generally, is preferred of a statute, unless the language is plainly an obstacle thereto.
>
> The plaintiff proceeds on the theory that the law of Ohio applies against the Minnesota corporation, and the Ohio jurisdiction attaches in the present case, because the accident happened in an Ohio tributary to the Lakes. There may be some doubt whether it is not the law of the Saxona's home port and the jurisdiction of Minnesota which control, if there is no federal law applying (Thompson Towing & Wrecking Association v. McGregor, 207 Fed. 209, 124, C. C. A. 479); but assuming that plaintiff's contention is right, then two consequences follow his construction of the saving clauses in sections 24 and 256 of the Judicial Code, both provocative of inconvenience, inequality, inconsistency and almost absurdity:
>
> First. The defendant, for torts on contract committed by it of precisely the same character and upon servants of precisely the same class, would be subject to as many varieties of responsibility, and would be compelled to vary its defenses as the laws pertaining to the incidents of service differ in the several places of accident. There are eight state jurisdictions bordering upon the waters in which the Saxona plies, and it is conceivable that eight seamen of the same class each might meet in his employment with an injury substantially of the same class in a port of each of such jurisdictions, each claimant enjoying a common right of

recovery under the maritime law or a different right under the local law.

Second. A seaman would enjoy the option of a uniform contractual right under the law maritime, or to vary under local laws the incidents of the contract as he proceeds from port to port and as he had occasion to invoke such rights. In Buffalo his contract would be one thing; in Cleveland, if the Ohio law differs from that of New York, it would have another phase; to change its color again in Detroit, Milwaukee, Duluth, Chicago and Michigan City, if the laws of their several jurisdictions, respectively, offered peculiarities. These conditions with all their inconveniences and inequalities and unnecessary burdens, are not compelled by the language of the saving clause in question, and should be avoided in construing that provision."

It seems to us to need little argument to establish that the enforcement of state regulations as to safety appliances against vessels engaged in interstate commerce would lead to an inevitable burden upon interstate commerce within the direct prohibition of the *Covington* case, and within the prohibition of those cases within which the principal of that case is more broadly stated.

It is respectfully submitted that the judgment should be reversed.

Dated, San Francisco,
February 10, 1915.

Ira A. Campbell,
Attorney for Plaintiff in Error.

(APPENDIX FOLLOWS.)

APPENDIX.

"Employers' Liability Act of Oregon of 1911."

(General Laws of Oregon, of 1911, p. 16.)

AN ACT

Providing for the protection and safety of persons engaged in the construction, repairing, alteration, or other work, upon buildings, bridges, viaducts, tanks, stacks and other structures, or engaged in any work upon or about electrical wires, or conductors or poles, or supports, or other electrical appliances or contrivances carrying a dangerous current of electricity; or about any machinery or in any dangerous any or all acts of negligence, or for injury or death of their employees, and defining who are the agents of the employer, and declaring what shall not be a defense in actions by employees against employers, and prescribing a penalty for a violation of the law.

Be it enacted by the People of the State of Oregon:

Section 1. All owners, contractors, sub-contractors, corporations or persons whatsoever, engaged in the construction, repairing, alteration, removal or painting of any building, bridge, viaduct, or other structure, or in the erection or operation of any machinery, or in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that all metal, wood, rope, glass, rubber, gutta percha, or other material whatever, shall be carefully selected and inspected and tested so as to detect and defects, and all scaffolding, staging, false work or other temporary structure shall be constructed to bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded; and all scaffolding, staging or other structure more than twenty feet from the ground or floor shall be secured from swaying and

provided with a strong and efficient safety rail or other contrivance, so as to prevent any person from falling therefrom, and all dangerous machinery shall be securely covered and protected to the fullest extent that the proper operation of the machinery permits, and all shafts, wells, floor openings and similar places of danger shall be enclosed, and all machinery other than that operated by hand power shall, whenever necessary for the safety of persons employed in or about the same or for the safety of the general public, be provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employees or other persons and the operator of the motive power, and in the transmission and use of electricity of a dangerous voltage full and complete insulation shall be provided at all points where the public or the employees of the owner, contractor or sub-contractor transmitting or using said electricity are liable to come in contact with the wire, and dead wires shall not be mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires shall be especially designated by a color or other designation which is instantly apparent and live electrical wires carrying a dangerous voltage shall be strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock; and generally, all owners, contractors or sub-contractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for

the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.

Section 2. The manager, superintendent, foreman or other person in charge or control of the construction or works or operation, or any part thereof, shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employee.

Section 3. It shall be the duty of owners, contractors, sub-contractors, foreman architects or other persons having charge of the particular work to see that the requirements of this act are complied with, and for any failure in this respect the person or persons delinquent shall, upon conviction of violating any of the provisions of this act, be fined not less than ten dollars, nor more than one thousand dollars, or imprisoned not less than ten days, nor more than one year, or both, in the discretion of the court, and this shall not affect or lessen the civil liability of such persons as the case may be.

Section 4. If there shall be any loss of life by reason of the neglects or failures or violations of the provisions of this act by any owner, contractor, or sub-contractor, or any person liable under the provisions of this act, the widow of the person so killed, his lineal heirs or adopted children, or the husband, mother or father, as the case may be, shall have a right of action without any limit as to the amount of damages which may be awarded.

Section 5. In all actions brought to recover from an employer for injuries suffered by an employee the negligence of a fellow servant shall not be a defense where the injury was caused or contributed to by any of the following causes, namely: Any defect in the structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman, or other person in charge or control of the works, plant, machinery or appliances; the incompetence or negligence of any person in charge of, or directing the particular work in which the employee was engaged at the time of the injury or death; the incompetence or negligence of any person to whose orders the employee was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted; the act of any fellow-servant done in obedience to the rules, instructions or orders given by the employer or any other person who has authority to direct the doing of said act.

Section 6. The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage.

Section 7. All acts or parts of acts inconsistent herewith are hereby repealed.